IN THE

# Supreme Court of the United States

No. ..... 76-829

OCTOBER TERM 1976

ANTHONY B. CATALDO,

*Petitioner.*

-against-

LESLIE J. BUGLASS, individually and as a member of Executive Committee of the Association of Average Adjusters of the United States, an unincorporated association, THOMAS LIVINGSTONE, individually and as Chairman of the said Association of Average Adjusters of the United States; CALEB DANA, individually and as Chairman of the Executive Committee of the Association of Average Adjusters of the United States; WILLIAM GREGG, ALLAN SCHUMACHER, CASPER H. HORSTING, and WILLIAM A. CARLSON; as members of the Executive Committee of the United States; and ALLAN SCHUMACHER, CASPER H. HORSTING and GARDNER A. NASON individually, and JOHNSON & HIGGINS, INC., and FRANK B. HALL & CO., INC.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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**Petition for Writ of Certiorari to the Court of Appeals of the State of New York**

The Petitioner, ANTHONY B. CATALDO, prays that a writ of certiorari issue to review the opinions and judgments of the Court of Appeals of the State of New York dismissing the appeal of the petitioner, and denying his motion for leave to appeal, by separate orders dated May 4, 1976; and by entering an order denying re-hearing dated September 21, 1976.

## OPINIONS BELOW

The orders and judgments of dismissal of the Court of Appeals are unreported and are attached hereto as appendix A, B, C, & D. The opinion of the Supreme Court of Queens County dismissing this action is unreported; it is attached hereto as Appendix H. The judgment entered thereon on June 18, 1975 appears as Appendix G hereto. The opinion and order of the Appellate Division of February 2, 1976 affirming the decision and judgment of the Supreme Court of Queens County is reported at 379 N.Y.S. (2) 154 and a true copy is attached hereto as Appendices E and F. Also attached are the decisions of the Supreme Court, Queens County dated March 26, 1970, (Appendix I), October 21, 1971, (Appendix N). The decision and orders of the Appellate Division Second Department dated March 1, 1971, and June 14, 1972 (Appendices J and K), are attached hereto. The orders of Court of Appeals of October 14, 1971, (Appendix L) and January 13, 1972, (Appendix M), are also attached hereto. Also attached are Decision of Appellate Division of March 2, 1973 affirming summary judgment to six individual defendants, marked Appendix O and Order of Court of Appeals dated November 14, 1974 denying leave to appeal summary judgment for six individual defendants, marked Appendix P.

## JURISDICTION

The order and judgment of the Court of Appeals was entered on May 4, 1976. The order of the Court of Appeals denying a re-hearing is dated September 21, 1976. This petition for certiorari was filed less than 90 days from the date last mentioned. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).



## QUESTIONS PRESENTED

Where petitioner had set out in his complaint a cause of action for reformation of a contract to perform personal services and for damages for a breach of that contract as reformed as against the association defendant, and for a tortious interference with such contract rights against the other defendants; and the association moved for summary judgment which was granted because of the operation of the Statute of Limitations which barred reformation, and there followed summary judgment for the six individuals by reason of the summary judgment against the Association, and separate appeals ensued on the grant of each judgment, which proceedings encompassed a time lapse of about five years and, thereafter, while petitioner was endeavouring to restate his cause of action to a simple contract cause, without reformation, the two corporate defendants moved to dismiss the original cause of action as to them for failure to prosecute and a cross-motion was made by petitioner for permission to replead and the motion to dismiss was granted and cross-motion of the petitioner to amend was denied because the court said that such lapse of time mandated the entry of such orders, whereas the Rules of practice under which the Court considered such motions, viz: Civil Practice Law & Rules, 3216 and 3025 do not so mandate but instead 3216 requires the Court to apply its discretion to determine whether the delay in noticing the matter for trial was reasonable and Rule 3025 requires the court to allow the amendment freely. Quaere?

(a) Didn't the proceedings in the Courts of the State of New York, in making orders of dismissal and refusing amendment to the complaint contrary to the letter and spirit of the procedural rules and statutes at the trial court level and

(b) the Appellate Division level in affirming such unlawful action, and

(c) at the Court of Appeals level in refusing to hear appeals from such order of affirmance; and didn't such State action, at the same time, deprive petitioner of his right of trial by jury of a common law action seeking the recovery of a money judgment for more than twenty dollars. If so, wasn't such deprivation violative of the Due Process and equal protection of the laws provisions of the Fourteenth amendment, and violative of Article VI, clause 2 of the Constitution of the United States.

## CONSTITUTIONAL STATUTORY AND RULES PROVISIONS

Constitution of the United States, Amendment XIV Section 1, states; "*** No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States, Article VI, clause 2 thereof, states:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof and all treaties made *** shall be the Supreme Law of the land; and the Judges in every state shall be bound thereby, anything in the Constitutions or Laws of any state to the contrary notwithstanding.

## STATUTES UNDER NEW YORK CIVIL PRACTICE LAWS AND RULES

Section 4101. Issues triable by a jury revealed before trial.

In the following actions, the issues of fact shall be tried by a jury unless a jury trial is waived or a reference is



directed under section 4317, except that equitable defenses and equitable counterclaims shall be tried by the court:

1. an action in which a party demands and sets forth facts which would permit a judgment for a sum of money only; ***

## RULES UNDER NEW YORK CIVIL PRACTICE LAWS AND RULES

R3025. Amended and supplemental pleadings.

***

(b) Amendments and supplemental pleadings by leave. A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

***

R3216. Want of prosecution.

(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

(b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:

(1) Issue must have been joined in the action;

(2) One year must have elapsed since the joinder of issue;

(3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or

certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within forty-five days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said forty-five day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed.

***

(e) In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such forty-five day period, the court may take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.

***

## STATEMENT OF THE CASE

In 1953, petitioner, a lawyer, and defendant association entered into an oral agreement under which petitioner was to perform the services of the Secretary of the association, as part and parcel of his law practice, and in exchange therefor the association was to provide petitioner with offices, its telephone and secretarial services and the use of its law library for his law practice for as long as petitioner was able to perform the services of Secretary. The intent of the parties was to make a long term contract, for petitioner to carry out the office of Secretary without payment of salary. The association consisted of professional average adjusters, insurance brokers, officials of marine insurance underwriters, owners and officials of corporate owners of steamships, marine surveyors, and lawyers doing admiralty work. It is in control of making by rules for the statement of average losses and it issued a seal to its professional



average adjuster members, which he would imprint upon the statements he would make. The statement was construed as stating a prima facie correct statement of the facts of the loss. Its membership was worldwide. A few months later in reducing this agreement to writing, it was further agreed that a clause be incorporated therein, giving the parties the right to cancel upon giving 60 days' written notice on condition, which condition was not to be put in the writing, that such a clause could not be used by the association unless petitioner gave good cause for its use such as stealing the dues, etc., otherwise the agreement was to continue as originally agreed upon. After fourteen years of faithful and satisfactory service and without any good cause given by petitioner for the use of the cancellation clause, the incumbent officers of the association in 1967, gave notice of cancellation and did cancel and declare the contract terminated.

The incumbent officers of the association in 1967, were employees of or under the control of the corporate defendants, Johnson & Higgins, and Frank B. Hall & Co., Inc. Said corporations were in the business of brokering insurance, a large part of it of a marine nature, and, of stating average losses for shipowners. The incumbent officers were professional average adjusters, and were members of the defendant association. These officers together with fellow average adjusters and employees of said corporate defendants did conspire to obtain control of the association in such manner that they could perpetuate such control within the ranks of the average adjusting members who were employed by or were under the control of the defendant corporations. Their action in terminating the agreement of the association was done in the interest of the two corporate defendants and their own. The ultimate purpose of such control was to gain for the corporate defendants a dominant position in the competition in the business of stating general and particular average losses that were required by shipowners to present to their in-

surance underwriters to recover damages sustained by their vessels. As the dominant force of the association, they would be in a position to gain better treatment for shipowners' claims from underwriters than the rest of the average adjusting firms in America. This, in turn, would place the corporate defendants in a better competitive position for the brokering of marine insurance policies for the fleets of vessels owned by said shipowners. Marine insurance brokering and the handling of loss statements is a worldwide business. Competition in America for such business was keen and the business was sought after by the many brokers in America. Statements of losses by average adjusters, also members of the association, would be given more recognition by the underwriters who would be liable to pay the losses stated, than non-member adjusters. The adjustments from the members employed by the corporate defendants would command even greater attention. Prior to 1967, all members of the association were treated as equals by petitioner in his capacity as their Secretary.

## A CHRONOLOGY OF EVENTS IN THE LAWSUIT

September 9, 1969—The suit was commenced as to all defendants in Supreme Court, Queens County.

October 12, 1969—The answer of the defendant association and the six individual defendants was served.

October 23, 1969—Answer of defendant, Frank B. Hall, was served.

October 24, 1969—Motion for summary judgment made by defendant association.

October 29, 1969—Answer of defendant, Johnson & Higgins.

April 14, 1970—Order of Supreme Court granting summary judgment dismissing the complaint as to association because the reformation count for mutual mistake was time-barred.



November 30, 1970—Motion to reargue granted but original decision adhered to.

November 30, 1970—Plaintiff noticed appeal from judgment and order granting said summary judgment.

March 1, 1971—Judgment affirmed, no opinion, by Appellate Division, Second Department, 36 A.D.(2) 720, 320 N.Y.S.(2) 504.

June 14, 1971—Plaintiff's motion to Appellate Division for reargument or permission to appeal to the Court of Appeals denied.

October 14, 1971—Plaintiff's motion to Court of Appeals for permission to appeal denied.

January 13, 1972—Plaintiff's motion to Court of Appeals for reargument denied.

April 20, 1971—The six individual defendants served motion for summary judgment.

October 21, 1971—The motion of the six individuals for summary judgment was granted by the Supreme Court on the ground that the judgment for the association was res judicata.

December 17, 1971—Plaintiff's motion to reargue summary judgment to six individual defendants served.

February 1, 1972—Decision of Supreme Court, Queens County, granting reargument but adhering to original decision made.

March 7, 1972—Plaintiff's motion to vacate summary judgments theretofore granted and for permission to plead reformation for fraud of defendant association, served.

May 31, 1972—Decision and order of Supreme Court denying motion to vacate and for permission to re-plead.

June 29, 1972—Appeal taken to Appellate Division from order of May 31, 1972 and both appeals joined for argument.

June 4, 1973—Decision of Appellate Division, Second Department made affirming orders of October 21, 1971, February 1, 1972 and May 31, 1972, no opinion. See 42 A.D.(2) 564, 344 N.Y.S.(2) 999.

July 5, 1973—Plaintiff moved the Appellate Division for reargument or for leave to appeal to the Court of Appeals.

July 26, 1973—Appellate Division, Second Department, denied plaintiff's motion to reargue or for leave to appeal to the Court of Appeals.

September 22, 1973—Plaintiff moved the Court of Appeals for leave to appeal to that court from the order of affirmance.

November 14, 1973—Court of Appeals denied leave to appeal.

May, 1974—Plaintiff sought to retain McCormick, Dunn & Foley, Esqs., as new counsel to restate the cause of action and move for permission to replead and to prosecute the action.

November, 1974—Attorneys for Johnson & Higgins served demand to file note of issue for trial.

January 8, 1975—Attorneys for Johnson & Higgins move to dismiss for lack of prosecution.

January 16, 1975—Attorneys for Frank B. Hall & Co. Inc., served demand to file note of issue for trial.

February 5, 1975—Plaintiff moved for permission to replead his complaint as per copy attached.

March 17, 1975—Attorneys for Frank B. Hall & Co., Inc., move to dismiss action and oppose application for permission to amend complaint.

May 8, 1975—Decision of Supreme Court, Queens County dismissing action and denying petitioner's motion to re-plead.

June 18, 1975—Judgment of dismissal entered in Clerk's office of Supreme Court, Queens County.



June 26, 1975—Appeal taken to Appellate Division, Second Department from judgment of dismissal.

February 15, 1976—Appellate Division, Second Department affirmed judgment of dismissal, see Memo opinion, 379 N.Y.S.(2) 154.

March 4, 1976—Appellate Division, Second Department denied plaintiff's motion for leave to reargue or to appeal to Court of Appeals.

April 1, 1976—Plaintiff served notice of appeal as of right on constitutional grounds pursuant to Section 5601(b)(1) CPLR.

April 6, 1976—Plaintiff moved Court of Appeals for leave to appeal to it. Defendants moved to dismiss plaintiff's appeal taken as of right on constitutional grounds.

May 4, 1976—Court of Appeals entered one order dismissing plaintiff's appeal taken as of right, and a separate order denying petitioner's motion for leave to appeal to the Court of Appeals, on ground that appeals were from discretionary orders.

July 29, 1976—Plaintiff moves Court of Appeals to reargue two orders of May 4, 1976 because orders appealed from were entered as a matter of law and not as discretionary orders.

September 21, 1976—Court of Appeals denied plaintiff's motion for re-hearing.

## HOW THE FEDERAL QUESTION WAS RAISED BELOW

When the decision of the Supreme Court, Queens County was made stating that the passage of time alone mandated the dismissal and denying plaintiff's cross-motion, that was the first manifestation of the un-constitutional nature of the Court's action. That decision

appeared to have been made on the law and not as a matter of discretion. The Rules required the Court to use its discretion in assessing whether the lapse of time was unreasonable and whether there was a good and meritorious cause of action. In failing to assess the facts in these respects but in holding that the time lapse mentioned mandated its action, the Court was acting in excess of jurisdiction. Its decision of dismissal and denying leave to amend the complaint according to New York law was null and void. At the same time, such decision deprived petitioner of due process and the right to equal protection of the laws. As it was a court action, it was subject to the mandate of Article 6, Clause 2 of the United States Constitution. In refusing to acknowledge the existence of the petitioner's Federal claims, both the Appellate Division and the Court of Appeals acted in an unconstitutional manner.

Petitioner first complained in his mair brief on the appeal to the Appellate Division. He states at page 29, "Here then is a good cause of action that qualifies for a trial to establish the truth of its assertions." At page 30, petitioner further stated, "neither the breach of the contract claimed by plaintiff nor the tort of malicious interference with such contract rights has ever been litigated on the merits." These statements were made after petitioner had reviewed the facts alleged in the proposed amended complaint and the law applicable to such facts, and he believed that he had shown a valid cause of action for breach of contract against the association and for a malicious interference with such contracts against the other defendants.

On the same appeal and in the reply brief, answering the claim of res judicata advanced by defendants as grounds for denying leave to re-plead, petitioner again urged the Appellate Division at page 4:

> "Consequently, due process would be violated by a refusal to permit the plaintiff to go to trial.



> Reliance upon an acceptance of the claims of the defendants which avoids the merits of the cause is erroneous."

Cases both of this court and of the Court of Appeals are cited in support. The reply brief says of the cases at page 4:

> "These cases have one thing in common; they state that rules of practice may not be so interpreted by courts so as to dispose of a cause without a trial."

At page 7 of the same reply brief, petitioner stated:

> "As Judge Holzman was acting pursuant to the authority granted to him under the summary judgment statute and as that statute clearly mandates that where an issue of fact appears, the court must send the case to trial (CPLR 3212(b)), the court had no power or authority to decide the fact that because reformation was time-barred, the writing was the contract. As he had no jurisdiction to consider that issue but decided it, anyway, his decision, insofar as it claims to find contradicted ultimate facts that had not been put before him for decision, is void as transgressing due process. A decision in violation of due process is a void decision and it cannot be relied upon for justification of any right based upon such void decision."

And, as upon the argument, the court questioned petitioner about the applicability of res judicata to the claim in the proposed pleading in such a way as to infer that res judicata might apply, petitioner wrote the court on January 12, 1976:

> "Basically, the question is, doesn't its (res judicata) application to the proposed complaint violate the due process clause of the United States Constitution?"

Further argument of the point follows this statement.

After the affirmance by the Appellate Division, petitioner filed a notice of appeal to the Court of Appeals as a matter of right because constitutional questions were involved as is permitted by CPLR 5601(b)(1). At the same time, petitioner moved the Court of Appeals for leave to appeal to that court pursuant to CPLR 5602(a)(e), and of Article 6, Section 3, subdivision b(6) of the New York Constitution.

The notice of appeal by its terms sought to raise the constitutional questions in the case. On the motion for leave to appeal, petitioner designated the subject of Point III of its brief:

> "The interpretation of Rules 3025 and 3216 CPLR by the courts below deprived appellant of due process."

Petitioner's Federal claims were not made at the trial court level, because the issue presented was whether the excuse for not noticing the case for trial was justifiable and whether plaintiff had a good and meritorious cause of action. Also, in proof of a good and meritorious cause of action, the proposed complaint was attached and the court was referred to Rule 3216(e) CPLR and 3025(b) CPLR as authority for the grant of permission to replead at any time, freely given upon terms as may be just. Neither Rule extended authority to do what was done here because there is no language in them to the effect that if five years elapsed between the commencement of the suit and the motion, that the suit must be dismissed. Least of all, do the Rules permit blaming the lapse of time upon petitioner where such lapse was caused by the action of seven of the defendants. Thus, the claims to violation of due process were made at the earliest opportunity and were renewed at each stage of the proceedings thereafter.



## REASONS FOR GRANTING WRIT OF CERTIORARI

The issue arising under the United States Constitution is a substantial one as it affects the right of a trial in a cause involving a breach of contract resulting in damages of more than twenty dollars and a trial with or without a jury has been denied to petitioner, in a manner that is unlawful both under the Common Law and the Rules and Statutes of New York, and both the Appellate Division and the Court of Appeals overlooked the fact that the action of the Supreme Court, Queens County denied the right of trial, by a jury, as guaranteed by the Constitution. They apparently regarded the Supreme Court's action as within the jurisdiction of the court; and both refused to pass upon the constitutional claims presented.

It is the clear fact of this case that there has been a disposition of a lawsuit that was within the ambit of the Seventh Amendment disposed of by the Supreme Court of New York without a trial ostensibly as a matter of law when no such law exists and where there are issues of fact in the case to be resolved.

Rule 3216 in its pertinent provision reads:

> "In the event that the party upon whom is served the demand specified in subdivision (b)(3) of this rule fails to serve and file a note of issue within such forty-five day period, the court may take such initiative or grant such motion unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action."

The demand was made and the note of issue was not filed by petitioner. Relying on that part or the clause reading:

> "unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action",

petitioner stated in opposition to the motion that the original cause of action was rendered untenable by the

grant of the separate summary judgments to the association and to the six individual defendants, but, that he had a viable cause of action on the only contract of the parties that had been made by them consisting of the writing dated June 19, 1953 and the oral condition that the 60 day cancellation clause therein could not be used by one party as against the other except for good cause shown, otherwise the agreement was to remain in force for as long as petitioner was capable of performing it. Consequently, it would have been a useless gesture to file the note of issue only to move to amend after the case had reached the calendar. The law does not require a futile act to be done, and that was the reason for not filing the note of issue. The fact that the suit was begun in November 1969 and the motion to dismiss was made in January, 1975 was explained as is done here by a statement of the chronology of the litigational steps in the matter showing petitioner's efforts at convincing the courts to permit him to go to trial on the reformation count and then when those efforts failed he endeavored to replead an ordinary breach of contract suit but needed the permission of the court to do so. In seeking permission, he had sought the aid of new counsel to state a new complaint, but when that, too, failed, and he was being pressed by defendant's motion to dismiss, he cross-moved for leave to serve the amended complaint attaching the proposed amended complaint to his cross-motion. That there was no abandonment of his claim or delay in seeking to restate the complaint and that such new complaint stated a good and meritorious cause of action is evident from a reading of the proposed pleading and from an understanding of the chronology of events in the suit. Petitioner fully expected that the Supreme Court, Queens County, would consider these reasons for their intrinsic worth and find that the passage of time, in awaiting the acceptance of the retainer by new counsel was a matter of months and not unreasonable and that the court would consider the proposed pleading as the complaint, and not



disregard its contents. The Supreme Court, Queens County, failed to use its discretion, saying:

> "Plaintiff, therefore, rather than resuming prosecution of the action, makes a belated attempt, upon defendant's motion to dismiss, to amend the complaint some five years after issue has been joined and over seven years after the alleged occurrence of the breach of plaintiff's employment contract.
>
> Where a party upon whom a demand to procees is served fails to serve and file a notice of issue within the 45-day period, it is incumbent upon him to show a justifiable excuse for the delay and a good and meritorious cause of action (CPLR 3216(e)). Even assuming, without deciding, that plaintiff has a meritorious cause of action, the inordinate delay in prosecuting the action mandates the dismissal of the complaint against the remaining defendants."

It is plain that the court first acknowledges that a party may show a justifiable excuse but later says that it cannot consider the offered excuse because "the inordinate delay" mandates the dismissal. This is a plain refusal to do what the rule requires the court to do. The rule says, "unless the said party shows a justifiable excuse for the delay", it does not give the court power to dismiss just causes, because there is a passage of time, least of all, a passage of time that was engendered by co-defendants allied in interest with the moving defendants. The mandate is to assess judicially the excuse for the delay and to assess whether there was a good cause of action. The court turned away from considering those reasons for the delay and went to an improper construction of the rule for decision and denied petitioner due process. A dismissal of a suit without a trial and without a waiver of constitutional rights denies due process. This court has so held in *Hovey v. Elliott*, 167 U.S.

409. Hence the decision was unlawful. Thus, this court has jurisdiction to decide the question in this case.

The provisions of the statute CPLR 3216(e) guards against the unconstitutional use of the power to dismiss a suit without a trial, because it limits the power of the court to grant the dismissal in circumstances mentioned. Such a rule must be strictly construed. The condition upon the court's jurisdiction to decide the question is mandatory; it must be followed or the determination is void. See McKinney's Consolidated Laws of New York, Book 1, Statutes, Sections 171 and 177; and *People ex rel Lawton v. Snell*, 216 N.Y. 527.

Said section 171 speaking of mandatory provisions of statutes says:

> "They go to the jurisdiction or authority of the person acting, and a compliance with them is a condition precedent to the validity of the action or determination under it."

Section 177 says:

> "*** courts may disregard the literal meaning of language to effect the legislative intent, and 'may' or some other term indicating discretion is sometimes interpreted as peremptory. Particularly is this true where public policy or private rights would otherwise be adversely affected, or where the act to be done concerns the public interest or the rights of third persons."

In *People ex rel Lawton v. Snell, supra*, the Court of Appeals went to great lengths to hold of a decision not in accordance with the provisions of a Statute, is that:

> "The mode or way in which the act shall be done or the determination reached prescribed by it must be strictly pursued, otherwise the act or the determination will be void."

It was said in *Brown v. Brown*, 93 N.Y.S.(2) 63 at p. 78,



aff'd 275 App. Div. 1068:

> "The doctrine has been frequently declared in this state that a court of equity has no inherent power to direct the sale or mortgage of the real estate of infants or incompetents and its power in this respect is purely statutory and such proceeding has been repeatedly declared to be void when not taken in conformity to the statute. The statute must be strictly pursued. Jurisdiction is not presumed in a special proceeding or in actions or proceedings in a court of limited jurisdiction. In order that the court's jurisdiction in such cases and that its judgment, decree or order shall be valid, it must first appear that all of the conditions prescribed by the statute have been met."

Many Court of Appeals cases are cited by Special Term in support of the foregoing statement. In one of such cases, *Matter of Doey v. Clarence P. Howland Co.*, 224 N.Y. 30, the Court of Appeals said at page 38:

> "The rule is well settled that a court authorized by statute to entertain jurisdiction in a particular case only if it undertakes to exercise jurisdiction in a case to which the statute has no application, does not acquire jurisdiction and its judgment or determination when made is a nullity and will be so treated whenever called into question by either a direct or collateral attack."

Whenever a court has disobeyed the plain command of a statute in making a determination in the guise of implementing the statute, its action has been declared a nullity in a variety of cases, by a higher court. In fact, the writ of prohibition is designed to avert such an unlawful act by a court. See a rather recent example in *Matter of Hogan v. Culkin*, 18 N.Y.(2) 330.

Furthermore, court rules of procedure such as the two Rules 3025 and 3216 CPLR, are limited to matters not

inconsistent with any statute." A statutory practice provision is Section 4101 CPLR which authorizes trials, in civil litigation for money judgments by jury, *Lambert v. Lambert*, 270 N.Y. 442; *Rovegno v. Lush*, 45 Misc. (2) 579, 257 N.Y.S.(2) 406 where this limitation is expressly set forth. Hence, these two rules are subject to the statutory command of 4101 CPLR.

Under the law of New York, clearly, the decision of Special Term in the case at bar is null and void because the court failed to weigh the facts showing a justifiable excuse and a good and meritorious cause of action but, instead, it applied a reason for its action that is not at all authorized by the rules of practice involved. One might say even, that the court had passed upon an issue not submitted to it rather than the issue submitted. In such a case, this court said in *Hovey v. Elliott*, 167 U.S. 409, at page 446, that deciding an issue not presented to the court was acting without notice to the parties and thus without due process of law. New York has held that a judgment denying due process is void; see *Atlas v. Ezrine*, 25 N.Y.(2) 219.

As to the validity of petitioner's cause, petitioner alleged on his cross-motion that the original complaint was subject to dismissal because it rested upon the reformation of the writing to state the integrated contract that had been originally made by the parties but as the court had barred reformation by reason of the applicable Statute of Limitations, and as such a bar went to the remedy and not to the substance, (see *Hurlburt v. Clarke*, 128 N.Y. 295; and *Matter of Lipset*, 21 A.D.(2) 509, 514), he sought permission to replead an ordinary cause of action for the breach of the integrated contract which was evidenced by the writing and the oral condition precedent to the use of the cancellation clause in the writing, as stated above. Petitioner alleged that no cause was ever given for the use of the cancellation clause but its use was motivated by the self-interest of the individual defendants and their corporate employers. Oral proof of the condition to the use of



the written cancellation could be made, see *Hicks v. Bush*, 10 N.Y.(2) 488, *Spina v. Ferentino*, 30 A.D.(2) 1035; *Hunt Food v. Doliner*, 26 A.D.(2) 41; *Landis Machinery v. Hydrolic Fabrications*, 41 A.D. (2) 607, *Warshaw v. Hassid*, 41 A.D.(2) 652; *Barker v. Bradley*, 42 N.Y. 316 and *Hartford Fire Insurance Co. v. Wilson*, 187 U.S. 467. See, also, 3 Corbin on Contracts, Chapters 581, 582, and 585, particularly at p. 446.

For the malicious interference with contract rights, see Harper & James, Vol. 1, Business Torts, Section 6.5-6.10; *Hornstein v. Podwitz*, 254 N.Y. 443, 449; *Campbell v. Gates*, 236 N.Y. 457; *Stell Mfg. Corp. v. Century Ind. Co.*, 15 A.D.(2) 87; *Potter v. Minskoff*, 2 A.D.(2) 513; and *Buckley v. 112 Cent. Park South*, 285 App. Div. 331.

Amendments to pleadings should be freely given; see *Gonsalvez v. Concourse Plaza*, 27 A.D.(2) 516. That is the mandate of the statute. This summary of petitioner's claim to relief is given to show not only that the proposed cause of action was a good and meritorious claim, but also to show that the New York courts failed to follow their own Rules of Procedure.

Petitioner believes that important issues are present which would warrant this honorable court to accept jurisdiction.

While petitioner cannot complain that the original complaint for reformation was dismissed, but, when permission to plead a breach of contract action which could be proven was denied; petitioner was not given a fair opportunity to be heard on the merits of his claim. Such action is repugnant to the constitutional rights and privileges and such court act necessarily involved such constitutional guarantees for they are part and parcel of the question that was before the court. The court below could not have decided the local question without also deciding the constitutional question. Coupled with the unlawfulness of the decision under local law, a review of the Federal

question falls without the jurisdiction of this honorable court, *Sayward v. Denny,* 158 U.S. 180; *Hanover Fire Ins. Co. v. Carr,* 272 U.S. 494, 509; *Metlakatla Indians etc. v. Egan,* 363 U.S. 555; and *Marsh v. Alabama,* 326 U.S. 501, 509, 510; and *Enterprises Irrigation Dist. v. Canal Co.,* 243 U.S. 157, 163-165. Where a state tax on interstate commerce was upheld by the State courts, this court is nevertheless free to decide the constitutional question for itself; see *American Oil Co. v. Neill,* 380 U.S. 451 and cases cited at p. 457.

Furthermore, the "importance" of the question may be shown where the decision sought to be reviewed is "Shockingly Wrong", see *Thompson v. Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157, 163, because the convictions were "so totally devoid of evidentiary support as to render them unconstitutional under the Due Process clause of the Fourteenth Amendment." For other types of state action falling within the jurisdiction of this court; see *Gibson v. Phillips Petroleum Co.,* 352 U.S. 874 (personal injury); *Washington v. U.S.,* 357 U.S. 384; *Dick v. New York Life Ins. Co.,* 359 U.S. 437 (Life Insurance); *Rogers v. Missouri R.R. Co.,* 352 U.S. 500, 510 (jury trial); *Beacon Theatres v. Westover,* 359 U.S. 500, 501 quoting *Dimick v. Schiedt,* 293 U.S. 476, 486, where it was said:

> "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

Mr. Justice Brennan said in *Rogers v. Missouri,* supra, at p. 510, that a special and important reason is present to grant certiorari to a state court when a litigant is deprived of his right to a trial.

This court said in *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, that the use of procedural rules might be lawfully invoked to do justice even if a right of trial with or



without a jury is denied, but that was in the limited case of a party's willful infraction of the rules. This court permitted the deprivation of a trial to Hammond as a sanction, saying his refusal to comply with discovery rules was a waiver of constitutional rights by the party himself, by his recalcitrant action. Here, there was no waiver. The petitioner's action was to seek to go to trial. Failing to recognize petitioner's efforts for what they were, the court below reached the decision it did by gross abuse of judicial discretion. This court said in *Fuentes v. Shevlin,* 407 U.S. 67 at p. 95:

> "Waiver of due process must be voluntarily, intelligently and knowingly made. It must be clear."

In *Boddie v. Conn.,* 401 U.S. 371, this Court said at p. 379, that a statute though valid may be applied so as to deprive an individual of a protected right, saying:

> "The right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals."

The rule is of long standing, see *Windsor v. McVeigh,* 93 U.S. 274; *Baldwin v. Hale,* 11 Wall (68 U.S.) 223; *In re Kemmler,* 136 U.S. 436, 438, and *Holden v. Hardy,* 169 U.S. 366, 375. It was acknowledged by the New York Court of Appeals that when there is an admixture of a Federal right with a local right, in a decision ostensibly based upon local law, but denying the constitutional rights inherently bound up in the whole question, that a constitutional question for this court is raised; see *East Meadow Com. etc. v. Board of Education,* 18 N.Y. (2) 129, 133. See also *Davis v. Wechsler,* 263 U.S. 22, 24. The New York Court of Appeals recognized the principle that while a state statute might have been constitutionally approvable, (as R. 3216 was), yet its application to a particular individual may transgress that individual's constitutional rights; see in Matter of Second Report of the November 1968 Grand Jury

of Erie County, 26 N.Y.(2) 200. Yet, that court dismissed the direct appeal taken to it from the orders denying petitioner a trial as guaranteed by the United States Constitution. The writ of this court would be proper, if directed to the Court of Appeals, which is directed by Statute to consider appeals on Constitutional questions. See *Tumey v. Ohio,* 273 U.S. 510, 515.

It is respectfully suggested that this case has its own importance for certiorari. A decision of a New York court necessarily affects a great many people who might become litigants. When constitutional rights are ignored by arbitrary action of the trial court while it misinterprets local procedural provisions, which should be corrected, but are not by the Appellate Division though the question was called to its attention, and they are ignored by the Court of Appeals, though petitioner called that honorable court's attention to the unconstitutional action in several different ways, as indicated above, the whole business affects the large quantity of litigants in the state. How can they be sure of their constitutional guarantees if what happened below were to be repeated which will surely happen if this court will not correct the New York courts. Allowing for the heavy court calendar in New York, that is no excuse for the court not doing their constitutional duty. Article VI, clause two of the Federal Constitution and such cases as *Robb v. Connelly,* 111 U.S. 624, state that this law paramount imposes upon all state judges the duty to act in a constitutional manner. This court also said in *Rogers v. Richmond,* 365 U.S. 534, 544, that the trial judge has a duty to make a judicial determination according to constitutional standards. Only this court can cause the New York courts to act within their boundary duty.

In *Rice v. Sioux City Cemetery,* 349 U.S. 70, this Court agreed to review a state court judgment where it did not conform to local law and it transgressed Federal rights, and it involved a civil suit between private litigants. In *Beck v. Washington,* 369 U.S. 541, Mr. Justice Black and Mr.



Justice Douglas discuss their views of the reviewability of state court judgments transgressing the Due Process and the Equal Protection of the Law provisions of the Fourteenth Amendment, in a manner that aptly fits this case.

Why should this petitioner, a lawyer in good standing, who worked hard and diligently to protect a contract right that would be valuable in his later years but is unlawfully terminated after fourteen years, for invalid reasons, be non-suited when he should have had a trial.

The liberality of procedural laws under New York is exactly as it is in the Federal courts. They are intended to aid in discovering the truth of the dispute. They are not an end in themselves; see Clarke, Procedural Code and Rules, 3 Vanderbilt L. Rev. 493. The New York cases are *Schenk v. State Line Telephone Co.,* 238 N.Y. 308, 310-312; *Kirby v. Clark,* 243 N.Y. 295; *and Korber v. Korber,* 16 N.Y.(2) 191, 193. CPLR 3025(b) as Rule 1 of the Federal Rules of Civil Procedure states that the rules "shall be construed to secure the just speedy and inexpensive determination of every civil judicial proceedings." The exhortations of the Court of Appeals cases mentioned above is the same as this court's language in *Foman v. Davis,* 371 U.S. 178; and *Conley v. Gibson,* 355 U.S. 41, 48. Weinstein-Korn-Miller, New York Practice, at Par. 3025.15 expressly states that New York's amendment of pleadings is patterned after the Federal rule. In fact, in both CPLR 3025(b) and FRCP, Rule 15a, it is stated that permission for amendments is to be freely given. It is difficult to reconcile the language of these cases to the action of the court below, except by recognizing the court action as a denial of the equal protection of the laws.

As the claim of the petitioner placed before the court below was the one stated in the proposed complaint and as the rule is that the allegations of a pleading must be liberally construed in favor of the claim and they are taken as true, (see *Jenkins v. McKeithen,* 395 U.S. 411), a good

and meritorious cause of action was the only evidence before the court. Reverting to the decision of the Supreme Court, Queens County, we find that that court refused to assess the proposed complaint and refused a trial to a claim admittedly valid, in law; but without sanction in the rules for such action. The other element was whether the time spent was justifiable. That time was spent by petitioner in seeking a trial albeit on a wrong complaint; it was not spent in delay going to trial. There are no charges by defendants that petitioner had done "nothing" for a long time and abandonment could be implied. In fact, petitioner offered to place the case on the calendar at any time that might be suggested by the court after permission to replead was granted. In that way, the case could proceed on a viable complaint. The Court does not seem to have been aware that the new complaint was necessary if the case was to go to trial and that the old complaint was useless. Nor was the court aware of the fact that the five year period spent in litigation was not an abandonment of the cause by petitioner, and that Rule 3216 does not sanction a dismissal under such circumstances or just because five years was spent in doing it. It is settled law that where litigation has taken up the time of a party that he is not guilty of laches, see Bouvier Law Dictionary, 3rd Ed., p. 1823. Hence, there was no evidentiary facts before the court to support its decision. Isn't such a decision as "shockingly wrong" as the state action in the Thompson and Garner, cases, supra.

Moreover, the facts of this matter present an effort by the courts of the State of New York to clear the courts of deadwood cases, mostly negligence cases that are started and never prosecuted; see Weinstein-Korn-Miller, New York Practice, paragraphs 3216.01, 3216.02, 3216.04, 3216.04a, 3216.04b. Apparently, *Sortina v. Fischer*, 20 A.D.(2) 25 cited by the Supreme Court, Queens County, is a leading case in that movement. There were some doubts about the constitutionality of the dismissals following upon



Sortina and Section 3216 was amended, in pertinent fashion, by the addition of subdivision (e), requiring a defendant to demand of the plaintiff to file a note of issue to put the case on the calendar. When after forty-five days, the case is not put on the calendar, the defendant may then move for dismissal. But, for constitutional reasons, dismissal was limited by giving the plaintiff an opportunity to explain why he had not filed the note of issue. Of course, if the plaintiff had not abandoned his case, he could respond to the notice either by placing the case on the calendar or by explaining why he had not. In this case, when the notice was received from Johnson & Higgins, petitioner advised that defendant's counsel that he was planning on amending his complaint and was awaiting word from the McCormick firm as to whether they would accept the retainer. Nevertheless, on the expiration of the forty-five days, Johnson & Higgins moved to dismiss and petitioner had no other alternative than to handle the defense to the motion, himself. He prepared his proposed complaint and cross-moved for permission to be allowed to re-plead. In addition, he filed opposition to the motion to dismiss, explaining the necessity of re-pleading and the futility of placing a cause on the calendar when the complaint had been made vulnerable to dismissal by the grant of summary judgments to the seven other defendants. The disastrous results completely overlooked the general purpose of subdivision (e) which was to save the case which had not been abandoned. The Court of Appeals which should have examined such arbitrary action and become aware of its unconstitutionality refused to review it. But, the unconstitutionality of the action is still there. This complex of facts have not been faced by this court before so far as diligent search has been able to discover. There are no annotations to Section 3216 indicating a case considered by this court, in any of the treatises dealing with CPLR. The Court of Appeals did uphold the Statute as constitutional, but only as a lawful act of the legislature. No

cases have considered the constitutionality of a case interpreting the act by the lower courts. Consequently, it is respectfully submitted, that this case presents a novel situation. In view of what is stated above about the wide application of the decision to the litigants using New York Courts, the novelty of the question and its resolution will affect a sizable part of our population.

The balance of state interest with the constitutional question is of minimal importances. As said by this court in *Boddie v. Connecticut, supra,* at pp. 375, 377, 379, a meaningful opportunity to be heard must be afforded to all litigants because they are forced to settle their claims of right and duty through the judicial process. However, a reversal of such state action will have a beneficial effect upon a large number of our people who will once more be assured that their constitutional rights are not being ignored. The exposition of this problem properly belongs on the argument on the merits rather than on this effort at convincing this court to grant this petitioner.

WHEREFORE, it is respectfully submitted that important constitutional questions are involved in this case to warrant this court's grant of certiorari.

Respectfully submitted,

ANTHONY B. CATALDO
Attorney for Petitioner, pro se



## APPENDIX A
## DECISION AND ORDER OF COURT OF APPEALS DENYING RE-HEARING DATED SEPTEMBER 21, 1976

Mo. No. 855
Anthony B. Cataldo,

Appellant,

vs.

Leslie J. Buglass, individually
etc., et al.,

Respondents.

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Motion for reargument of motion for leave to appeal and for reargument of motion to dismiss appeal taken as of right denied with twenty dollars costs and necessary reproduction disbursements.

## APPENDIX B
## DECISION AND ORDER OF COURT OF APPEALS DISMISSING APPEAL AND DENYING MOTION FOR LEAVE TO APPEAL, DATED MAY 4, 1976

Mo. No. 425

ANTHONY B. CATALDO,

Appellant,

vs.

LESLIE J. BUGLASS, individually etc., et al.,

Respondents.

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Motion for leave to appeal dismissed, with twenty dollars costs and necessary reproduction disbursements to respondent Johnson & Higgins, Inc., upon the ground that the order sought to be appealed from involves a question of discretion of the type not reviewable by the Court of Appeals.

Cross-application to dismiss the appeal taken as of right herein granted and the appeal dismissed, without costs, upon the ground that the order appealed from involves a question of discretion of the type not reviewable by the Court of Appeals.



## APPENDIX C
## ORDER OF COURT OF APPEALS DISMISSING APPEAL DATED MAY 4, 1976

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Fourth day of May, A.D. 1976

Present, HON. CHARLES D. BREITEL, Chief Judge, presiding

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Mo. No. 425
ANTHONY B. CATALDO,

Appellant,

vs.

LESLIE J. BUGLASS, individually etc., et al.,

Respondents

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A cross-application to dismiss the appeal taken as of right by the appellant herein having been heretofore made upon the part of the respondent Johnson & Higgins, Inc. and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that the order appealed from involves a

question of discretion of the type not reviewable by the Court of Appeals.

s/Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

**APPENDIX D**
**ORDER OF COURT OF APPEALS DENYING MOTION FOR LEAVE TO APPEAL DATED MAY 5, 1976**

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourth day of May A.D. 1976

Present, HON. CHARLES D. BREITEL, Chief Judge, presiding.

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Mo. No. 425
ANTHONY B. CATALDO,

Appellant,

vs.

LESLIE J. BUGLASS, individually
etc., et al.,

Respondents.

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A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is



ORDERED, that the said motion be and the same hereby is dismissed, with twenty dollars costs and necessary reproduction disbursements to respondent Johnson & Higgins, Inc., upon the ground that the order sought to be appealed from involves a question of discretion of the type not reviewable by the Court of Appeals.

s/Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

**APPENDIX E**
**ORDER OF APPELLATE DIVISION, SECOND DEPARTMENT DATED FEBRUARY 2, 1976 AFFIRMING JUDGMENT APPEALED FROM**

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ANTHONY B. CATALDO,

Appellant,

vs.

LESLIE J. BUGLASS, etc., et al.,

Respondents.

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At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 2, 1976.

HON. JAMES D. HOPKINS, Acting Presiding Justice
HON. HENRY J. LATHAM
HON. MARCUS G. CHRIST
HON. VITO J. TITONE
HON. JOSEPH W. HAWKINS, Associate Justices

In the above entitled cause, the above named Anthony B. Cataldo, plaintiff, having appealed to this court from a judgment of the Supreme Court, Queens County, entered June 18, 1975, in favor of the corporate defendants, upon an order of the same court, dated May 27, 1975, which (1) granted the separate motions of those defendants to dismiss for want of prosecution and (2) denied plaintiff's cross-motion for leave to amend the complaint; and the said appeal having been argued by Ben Lieblein, Esq., of counsel for the appellant, argued by R. Scott Greathead, Esq., of counsel for the respondent Frank B. Hall & Co., Inc., submitted by Stephen P. Kyne, Esq., of counsel for the individual respondents, without a brief, and argued by John R. Geraghty, Esq., of counsel for the respondent Johnson & Higgins, Inc., due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment appealed from is hereby unanimously affirmed, with one bill of $50 costs and disbursements to respondents appearing separately and filing separate briefs.

Enter: IRVING N. SELKIN
Clerk of the Appellate Division

Order of Appellate Division Dated February 2, 1976

## APPENDIX F
## DECISION OF APPELLATE DIVISION SECOND DEPARTMENT DATED FEBRUARY 2, 1976 AFFIRMING JUDGMENT APPEALED FROM

CATALDO, ap, v. BUGLASS, res — In an action inter alia to recover damages for breach of contract, plaintiff appeals from a judgment of the Supreme Court, Queens County, entered June 18, 1975, in favor of the corporate



defendants, upon an order of the same court, dated May 27, 1975, which (1) granted the separate motions of those defendants to dismiss for want of prosecution and (2) denied plaintiff's cross-motion for leave to amend the complaint.

Judgment affirmed, with one bill of $50 costs and disbursements to respondents appearing separately and filing separate briefs.

Plaintiff did not show a justifiable excuse for the delay in prosecution and a good and meritorious cause of action, as required by CPLR 3216 (see Brender v. Berman, 37 A.D. 2d 835). Issue was joined in 1969; summary judgment was granted in favor of the defendant association and certain of the individual defendants in 1970 and 1971, respectively, and affirmed by this court in each instance (Cataldo v. Buglass, 36 A.D. 2d 720, mot. for lv. to app. den., 32 N.Y. 2d 518). Plaintiff failed to resume prosecution and to file a note of issue within forty-five days of service upon him of the separate demands therefor of the corporate defendants, made in 1974 and 1975. Rather, upon their motions to dismiss, plaintiff cross-moved to amend his complaint, alleging a new understanding of the parole evidence rule as set forth in a case decided in 1962. Such delay in seeking amendment precludes its being granted (see DeFabio v. Nadler Rental Serv., 27 A.D. 2d 931).

## APPENDIX G
## JUDGMENT OF SUPREME COURT, QUEENS COUNTY DATED JUNE 18, 1975 DISMISSING ACTION

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ANTHONY B. CATALDO

Appellant,

vs.

LESLIE J. BUGLASS, etc., et al.

Respondents.

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An order having been entered in the office of the Clerk of the County of Queens on May 28, 1975 granting the separate motions of defendants, Johnson & Higgins (sued herein as Johnson & Higgins, Inc.), and Frank B. Hall & Co., Inc., to dismiss the action and complaint as against them pursuant to CPLR 3216, and the action having been heretofore severed and dismissed as against all of the other defendants, and directing the Clerk of the County of Queens to enter judgment dismissing this action and the complaint as against defendants Johnson & Higgins, and Frank B. Hall & Co., Inc., with costs and disbursements to be taxed.

NOW on motion of Kirlin, Campbell & Keating, attorneys for defendant Johnson & Higgins, it is

ADJUDGED that the complaint and this action are dismissed as against defendant, Johnson & Higgins, and that the said Johnson & Higgins, recover the sum of $50.00, costs as taxed from the plaintiff, Anthony B. Cataldo, and that the said defendant have execution therefor.



NOW on motion of Lord, Day & Lord, attorneys for defendant, Frank B. Hall & Co., Inc., it is

ADJUDGED that the complaint and this action are dismissed as against defendant Frank B. Hall & Co., Inc., and that the said Frank B. Hall & Co., Inc., recover the sum of $50.00, costs as taxed from the plaintiff, Anthony B. Cataldo and that the said defendant have execution therefor.

John J. Durant
CLERK

## APPENDIX H
## DECISION OF SUPREME COURT, QUEENS COUNTY DATED MAY 6, 1975 DISMISSING ACTION AND DENYING MOTION TO REPLEAD

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ANTHONY B. CATALDO

vs.

LESLIE J. BUGLASS, etc., et al.

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BY BROWN, J.

DATED MAY 6, 1975

By separate notice of motion, defendants Johnson & Higgins, Inc. and Frank B. Hall & Co., Inc. move pursuant to CPLR 3216 to dismiss the complaint for want of prosecution. Plaintiff, also by separate notice of motion, seeks leave to amend the complaint pursuant to CPLR 3025(b).

Plaintiff commenced this action by service of a summons and complaint on September 9, 1969 to reform a 1953 employment contract terminated in 1967, to recover the reasonable value of services and to recover damages arising from an alleged tortious interference with contractual relations. Issue was joined by defendant Johnson & Higgins by service of an answer on October 29, 1969 and on October 23, 1969 defendant Frank B. Hall joined issue by service of its answer. Summary judgment dismissing the complaint has been granted against all named defendants with the exception of movants. Plaintiff's last activity in this action terminated on November 14, 1973 with the denial by the Court of Appeals of his motion for leave to appeal the affirmance by the Appellate Division of the orders of this court adhering to its decisions granting summary judgment to the individual defendants and the denial to plaintiff of certain other relief.

Defendants Johnson & Higgins and Frank B. Hall served written demands on plaintiff, received on November 4, 1974 and January 20, 1975 respectively, to resume prosecution of the action as to them and to serve and file a note of issue within 45 days after receipt of the demands pursuant to the requirements of CPLR 3216(b)(3). Plaintiff, an attorney who is now appearing *pro se*, has failed to file a note of issue within the specified time, his sole excuse being that he had "discovered" a new theory for his complaint sounding primarily in the breach in 1967 of the employment contract. Plaintiff, therefore, rather than resuming prosecution of the action, makes a belated attempt, upon defendants' motions to dismiss, to amend the complaint some five years after issue has been joined and over seven years after the alleged occurrence of the breach of plaintiff's employment contract.

Where a party upon whom a demand to proceed is served fails to serve and file a note of issue within the 45-day period, it is encumbent upon him to show a justifiable excuse for the delay *and* a good and meritorious cause of



action. (CPLR 3216(e) ). Even assuming, without deciding, that plaintiff has a meritorious cause of action, the inordinate delay in prosecuting the action mandates the dismissal of the complaint as against the remaining defendants. As the Appellate Division, First Department, stated in *Sortino v. Fisher* (20 A D 2d 25), "(e)xcuses for avoidable delay are insufficient which merely lay the delay at the door of plaintiff himself, his lawyer of record, trial counsel (or) other associated counsel ***." (*Supra*, p. 29.) The court also noted that "it is no excuse for plaintiff to become active on the eve of a motion to dismiss for neglect or to become active thereafter." (*Supra*, p. 30).

As to plaintiff's application for leave to serve an amended complaint, similar inexcusable delay mitigates against the granting of the motion. Where plaintiff had or should have had "knowledge of the facts which he wishes to put in his later pleadings, but refrains from moving to amend for an inexcusably long period of time, his motion will be denied because of gross laches (citations omitted)." (*DeFabio v. Nadler Rental Service, Inc.*, 27 A D 2d 931.)

Accordingly, the motions by defendants Johnson & Higgins, Inc. and Frank B. Hall & Co., Inc. to dismiss the complaint for want of prosecution are granted. Plaintiff's motion for leave to amend the complaint is denied.

Settle one order.

Leo Brown
J.S.C.

## APPENDIX I
## DECISION OF SUPREME COURT, QUEENS COUNTY GRANTING MOTION OF ASSOCIATION FOR SUMMARY JUDGMENT DATED MARCH 29, 1970

SPECIAL TERM, PART I

ANTHONY B. CATALDO

vs.

LESLIE J. BUGLASS, etc., et al.

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BY HOLTZMAN, J.

DATED MARCH 26, 1970

Defendant Association of Average Adjusters of the United States (hereinafter "Association") moves for summary judgment pursuant to CPLR 3212. Those of the facts contained in the papers submitted to this court relating to the causes of action asserted against the Association which are not in dispute can be summarized as follows:

On or about June 19, 1953 plaintiff and the Executive Committee of the Association entered into an agreement which provided *inter alia* that plaintiff would serve as Secretary of the Association and that, in return, plaintiff was to pay the Association the sum of $240 per year for the use of the office then maintained by the Association and its secretarial staff for his own personal legal practice. The agreement specifically set forth the duties of the Secretary of the Association that plaintiff undertook to perform. The agreement also provided: "Either of the parties hereto may



cancel this Agreement upon giving the other sixty (60) days notice thereof in writing at their respective addresses." On September 26, 1967 the Association notified plaintiff that it was terminating the agreement pursuant to the sixty-day provision quoted above.

In his first cause of action plaintiff seeks to reform the 1953 agreement. He alleges that because of a mutual mistake the sixty-day provision was included, but that the true intent of the draftsmen of the agreement was to give him lifetime tenure, and that his removal was meant to be only for good cause. Plaintiff further alleges that his removal was not for cause and he seeks to recover in his first cause of action the sum of $150,000 for the breach of the agreement as reformed.

For his second cause of action plaintiff seeks to recover the reasonable value of his services as Secretary of the Association and he seeks the sum of $261,000 by which he alleges the Association has been unjustly enriched.

In support of the motion, the Association contends (1) that reformation of the agreement is barred by the parol-evidence rule; (2) that reformation is barred by the Statute of LImitations; and (3) that the bylaws of the Association did not empower the Association to enter into a lifetime agreement.

Judgment is granted dismissing the first cause of action because this action to reform an agreement drafted in 1953 is barred by the Statute of Limitations for the following reasons: Under section 53 of the Civil Practice Act, an action for reformation was governed by the ten-year Statute of Limitations. Under the CPLR, the applicable period of limitations for an action based upon mistake is six years. (CPLR 213[6]). The general rule which has been established is that an action to reform an instrument on the ground of mistake accrues on the date of delivery of the instrument or on the date the act or omission occurred and not on the date of the discovery of the mistake. (See

*Friedman v. Nagin*, 270 App. Div. 503.) Plaintiff contends, however, that he discovered the mistake in 1967 and that, despite the foregoing rule, i.e., that the statute begins to run from the date of delivery, in this case the statute should be deemed to run from the date of his discovery of the mistake because he was a party in possession of real property under an instrument sought to be reformed.

In *Hart v. Blabey* (298 N.Y. 257), the Court of Appeals stated:

> "Ordinarily, of course, except in fraud cases, the running of the statute does not depend on discovery, but the present case is within a well recognized exception to the general rule. That exception may be stated thus: as to one who is in possession of *real property under an instrument of title*, the statute never begins to run against his right to reform that instrument until he has notice of a claim adverse to his under the instrument, or until his possession is otherwise disturbed. '*** when a party to whom land belongs in equity, is in possession and is afterwards evicted by one claiming a legal title, the statute does not begin to run until such eviction. A bill consequently may be filed at any time within ten years after the eviction.' " (Emphasis supplied.)

This court is of the opinion that plaintiff cannot take advantage of the rules in *Hart* (*supra*) because he is not in possession of real property under an *instrument of title*. This result is buttressed by the decisions in two cases which are analogous.

In *Northerly Corp. v. Hermett Realty Corp.* (15 A D 2d 888) defendant, who was in possession of real property, sought in a counterclaim to reform a lease. The court stated (at p. 889):

> "Appellants' counterclaim seeking reformation and a declaratory judgment is barred by the



> Statute of Limitations. The instrument sought to be reformed is the lease executed on or about May 14, 1941. Such an action is governed by the 10-year Statute of Limitations provided in section 53 of the Civil Practice Act. The statute in this case began to run when the lease was delivered. Defendants concede that they knew the clause was contained in the lease. The opportunity to act in regard to it arose on delivery. Hence, both the causes for reformation and for declaratory judgment would be barred by the 10-year statute. The counterclaim was therefore properly dismissed."

Similarly, in *Board of Fire Commissioners v. Windmill Farm Water-Works Corp.* (225 NYS 2d 801), which was an action to enforce a license granted to plaintiff to make connections to and to use defendant's fire hydrants, the court stated (at p. 804):

> "The license was executed by defendant on January 8, 1951 and was accepted by plaintiff on February 13, 1951. The present action was commenced on November 16, 1961 (more than 10 years and 9 months later). Unquestionably, the second cause, not based on common law fraud and deceit (sec. 48, Subd. 5, Civil Practice Act) is one in equity for reformation and the ten year statute applies (Civil Practice Act, §53; Friedman v. Nagin, 270 App. Div. 503, 60 N.Y.S. 2d 620). Bearing in mind that plaintiff seeks the reformation upon the ground of mutual mistake or mistake on the part of plaintiff and fraud on the part of defendant, the statute of limitations runs from the date of the acceptance of the license and its running is unaffected by the fact that the mutual mistake or the mistake of plaintiff and the fraud of defendant may not have been discovered until some later date (Metcalf v. Metcalf, 196 Misc. 842, 92 N.Y.S. 2d 767, affd. 276 App. Div.

1068, 96 N.Y.S. 2d 490, affd. 302 N.Y. 822, 100 N.E. 2d 33; Friedman v. Nagin, supra)."

Accordingly, since plaintiff was not in possession under an instrument of title, the statute began to run in 1953 and the time has long passed during which he can bring an action to reform this contract.

Judgment is also granted dismissing the second cause of action. The contract between the parties clearly provided that plaintiff was to perform his secretarial duties and the contract contained the quid pro quo for the performance of these duties. Plaintiff has only sought to reform the provision of the agreement relating to his tenure; he has not questioned the validity of the balance of the agreement. In his opposing affidavit plaintiff admits, with regard to the circumstances of the execution of the contract, that "The Executive Committee offered plaintiff the office quarters of the Association, its library, secretary and telephone services, in exchange for plaintiff's performing the Secretarial duties"; plaintiff continued: "There would be no salary, per se, to be paid." Plaintiff also admits that during the term of the agreement the Association did provide him the secretarial help that was promised and that he did use the office. Under these circumstances, the cause of action predicated on unjust enrichment has no merit.

Accordingly, summary judgment is granted in favor of the Association and the action is dismissed as against the Association.

Submit order.

s/Holtzman
J.S.C.



## APPENDIX J

## ORDER OF APPELLATE DIVISION, SECOND DEPARTMENT, DATED MARCH 1, 1971, AFFIRMING ORDERS FOR SUMMARY JUDGMENT TO ASSOCIATION

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 1, 1971

HON. SAMUEL RABIN, Presiding Justice
HON. M. HENRY MARTUSCELLO
HON. J. IRWIN SHAPIRO
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN Associate Justices

---

ANTHONY B. CATALDO,

Appellant,

v.

LESLIE J. BUGLASS, individually and as a member of the Executive Committee of the Association of Average Adjusters of the United States, an unincorporated association, et al.,

Respondents,

et al.,

Defendants. ---

In the above entitled cause, the above named Anthony B.

Cataldo, plaintiff, having appealed to this court from an order of the Supreme Court, Queens County, dated April 14, 1970 and from as much of a further order of the same Court dated November 30, 1970, as on reargument, adhered to the original decision dismissing the complaint as to defendant Association of Average Adjusters of the United States; and the said appeal having been argued by Eugene G. Lamb, Esq., of counsel for the appellant, and by Thomas A. Dillon, Jr., Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order dated November 30, 1970 insofar as appealed from is hereby unanimously affirmed; and it is further

ORDERED that the appeal from the order of April 14, 1970 is hereby dismissed; and it is further

ORDERED that respondents are awarded one bill of $10 costs and disbursements, to cover both appeals.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

## APPENDIX K

### ORDER OF THE APPELLATE DIVISION SECOND DEPARTMENT DENYING MOTION TO REARGUE OR FOR LEAVE TO APPEAL SUMMARY JUDGMENT TO ASSOCIATION

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 14, 1971.



HON. SAMUEL RABIN, Presiding Justice.
HON. M. HENRY MARTUSCELLO
HON. J. IRWIN SHAPIRO
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN Associate Justices

---

ANTHONY B. CATALDO,

Appellant,

v.

LESLIE J. BUGLASS, individually and as a member of the Executive Committee of the Association of Average Adjusters of the United States, an unincorporated association, et al.,

Respondents,

et al.,

Defendants

---

In the above entitled cause, the above named Anthony B. Cataldo, appellant, having moved to reargue the appeal or for leave to appeal to the Court of Appeals; from an order of this court, dated March 1, 1971;

Now, upon the papers filed in support of said motion and the papers filed in opposition thereto; upon the papers on which the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is:

ORDERED that the motion is hereby denied.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

## APPENDIX L
## ORDER OF COURT OF APPEALS DATED JULY 4, 1971 DENYING LEAVE TO APPEAL JUDGMENT FOR SUMMARY JUDGMENT FOR ASSOCIATION

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fourteenth day of October, A.D. 1971.

PRESENT, HON. STANLEY H. FULD,
Chief Judge, presiding.

---

ANTHONY B. CATALDO,

Appellant,

vs.

ASSOCIATION OF AVERAGE ADJUSTERS OF THE UNITED STATES,

Respondents,

and

LESLIE J. BUGLASS & ors.

Defendants.

---



A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary reproduction disbursements.

A copy
s/Gearon Kimball
Deputy Clerk

## APPENDIX M

## ORDER OF COURT OF APPEALS DATED JANUARY 13, 1972 DENYING REARGUMENT OF ITS REFUSAL TO REVIEW SUMMARY JUDGMENT FOR ASSOCIATION

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Thirteenth day of January, A.D. 1972.

PRESENT, HON. STANLEY H. FULD, Chief Judge, presiding

---

ANTHONY B. CATALDO,

Appellant,

vs.

ASSOCIATION OF AVERAGE ADJUSTERS OF THE UNITED STATES,

Respondent,

and

LESLIE J. BUGLASS & ors.,

Defendants.

---

A motion for reargument of a motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy
s/Gearson Kimball
Deputy Clerk



**APPENDIX N**
**DECISION OF SUPREME COURT, QUEENS COURT DATED OCTOBER 21, 1972 GRANTING SUMMARY JUDGMENT TO SIX INDIVIDUAL DEFENDANTS.**

BY HOLTZMAN, J.

DATED OCTOBER 21, 1971

---

ANTHONY B. CATALDO

vs.

LESLIE J. BUGLASS etc., et al.

---

The individual defendants' motion for summary judgment is granted.

In a decision rendered on March 26, 1970, which was affirmed by the Appellate Division (*Cataldo v. Buglass*, 36 A D 2d 720), this Court granted summary judgment dismissing the first and second causes of action in the complaint. In these causes of action plaintiff sought to reform the agreement of June 19, 1953, and also sought to recover damages for unjust enrichment.

Movants seek summary judgment dismissing the third and fourth causes of action, which are predicated on the theory that movants tortiously induced the breach of plaintiff's contract. The June 19th agreement provided "Either of the parties hereto may cancel this Agreement upon giving the other sixty (60) days notice thereof in writing". In the March 16, 1970 decision this court denied plaintiff's claim to reform the agreement and also held that

the parties had adhered to the balance of the agreement. Accordingly, since the June 19, 1953 agreement was valid and binding, the Association had the right to cancel that agreement so long as it adhered to the procedure set forth for cancellation. Since the Association had the legal right to terminate, it committed no breach of contract in doing so, and therefore, the individual defendants, who admittedly did no more than persuade the Association to exercise that right, may not be held to have tortiously induced a breach of contract. (See *E. R. Squibb & Sons v. Shapiro*, 64 N Y S 2d 368.)

Settle order.

J.S.C.

APPENDIX

**APPENDIX O**

**DECISION OF APPELLATE DIVISION SECOND DEPARTMENT DATED MARCH 2, 1973 AFFIRMING GRANT OF SUMMARY JUDGMENT TO SIX INDIVIDUAL DEFENDANTS**

Anthony B. Cataldo, appellant, v. Leslie J. Buglass, individually and as a member of the Executive Committee of the Association of Average Adjusters of the United States, etc., et al, respondents, et al., defendants.

In an action against an unincorporated association, certain of its officials and others for reformation of a contract and for damages *inter alia* for breach of the contract, plaintiff appeals from three orders of the Supreme Court, Queens County, as follows: (1) from one dated November 11, 1971, which granted a motion by six



individual defendants for summary judgment dismissing the complaint as against them; (2) as limited by his brief, from so much of the second order, dated March 21, 1972, as, on reargument, adhered to said decision granting summary judgment; and (3) from the third order, dated May 31, 1972, which denied plaintiff's motion *inter alia* to vacate a certain judgment.

Appeal from order of November 11, 1971 dismissed as academic. That order was superseded by the order of March 21, 1972 granting reargument.

Order of March 21, 1972 affirmed insofar as appealed from and order of May 31, 1972 affirmed. No opinion.

Respondents are awarded one bill of $20 costs and disbursements to cover the three appeals.

HOPKINS, Acting P.J., MUNDER, MARTUSCELLO, GULOTTA and BRENNAN, JJ., concur.

June 4, 1973

**APPENDIX P**

**ORDER OF COURT OF APPEALS DATED NOVEMBER 14, 1973, DENYING MOTION FOR LEAVE TO APPEAL FROM SUMMARY JUDGMENT FOR SIX INDIVIDUAL DEFENDANTS.**

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Fourteenth day of November, A.D. 1973.

Present, HON. STANLEY H. FULD,
Chief Judge, presiding.

---

ANTHONY B. CATALDO,

Appellant,

vs.

JESLIE J. BUGLASS & ors.,
& ASSOCIATION OF AVERAGE ADJUSTERS
OF THE UNITED STATES,

Respondents,

& ors.,

Defendants.

---

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied, with ten dollars costs and necessary reproduction disbursements.

A copy

s/James M. Flavin
Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM 1976

No. 76-829

ANTHONY B. CATALDO,

*Petitioner,*

—against—

LESLIE J. BUGLASS, individually and as a member of Executive Committee of the Association of Average Adjusters of the United States, an unincorporated association, THOMAS LIVINGSTONE, individually and as Chairman of the said Association of Average Adjusters of the United States; CALEB DANA, individually and as Chairman of the Executive Committee of the Association of Average Adjusters of the United States; WILLIAM GREGG, ALLAN SCHUMACHER, CASPER H. HORSTING, and WILLIAM A. CARLSON; as members of the Executive Committee of the United States; and ALLAN SCHUMACHER, CASPER H. HORSTING and GARDNER A. NASON individually, and JOHNSON & HIGGINS, INC., and FRANK B. HALL & Co., INC.,

*Respondents.*

## BRIEF OF RESPONDENT JOHNSON & HIGGINS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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KIRLIN, CAMPBELL & KEATING
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CHARLES N. FIDDLER
*Of Counsel*

GOLDNER PRESS, INC. LAW AND FINANCIAL PRINTERS WO 6-5525

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*Respondents.*

---

## BRIEF OF RESPONDENT JOHNSON & HIGGINS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

### Jurisdiction

This court is without jurisdiction to grant a writ of certiorari to review the order of the Appellate Division of the Supreme Court of the State of New York, Second Dept. (the highest state court in which a decision could be had,

rather than, as stated in the petition, the order of the New York Court of Appeals, which had declined review of the order of the Appellate Division) because the petition presents no federal question reviewable under 28 USC §1257 (3).

The sole question involved is the nonfederal ground of the exercise of discretion by state courts under states rules of procedure to dismiss for want of prosecution and to deny the petitioner's motion to amend his complaint as against all of the respondents, made in the fifth year after the commencement of the action and more than one year after the final appellate disposition of the petitioner's claims by the affirmances of summary judgments of dismissal as against all but the two respondents who, after such final disposition on appeal, sought and obtained the dismissal of the action as against them for want of prosecution.

## Statement

The petitioner, an attorney at law, now appearing *pro se,* commenced his action in 1969, on an asserted state created nonfederal claim, in the Supreme Court of the State of New York, County of Queens, (the trial court in New York) seeking to reform an agreement made in 1953, (which provided, among other things, for the use of office space by petitioner in exchange for his services as an Association secretary and the annual payment of $240, and also seeking damages for its alleged breach and a tortious interference therewith (12a).

Issue was joined in 1969, by the service of the answers to the complaint, and thereafter separate motions were made by the respondents, with the exception of respondent Johnson & Higgins, Inc. (hereinafter "Johnson & Higgins", its correct name) and Frank B. Hall & Co., Inc. (herein-



after "Frank B. Hall"), for summary judgment dismissing the complaint, which were granted in 1970 (12a) and 1971 (23a), and the actions dismissed, and also severed, as to the then non-moving respondents, Johnson & Higgins and Frank B. Hall.

From 1970 to 1973, the petitioner's various motions for reargument, appeals to the Appellate Division of the Supreme Court, Second Department and motions for leave to appeal to the New York Court of Appeals to reverse the summary judgments of dismissal were rejected, so that on November 14, 1973 it was finally determined up to the Court of Appeals that there were no triable issues of fact as against the moving defendants and that the plaintiff's claim as so litigated had no merit. New York Civil Practice Law and Rules (hereinafter "CPLR") 3212.

In November 1974 and January 1975, five years after joinder of issue and one year after such final determination, Johnson & Higgins and Frank B. Hall each served a demand upon the plaintiff to serve and file a note of issue (a notice to place the case on trial calendar) in accordance with CPLR 3216, which the plaintiff totally ignored.

Accordingly, separate motions were thereafter made by Johnson & Higgins and Frank B. Hall in January and March 1975 to dismiss the action as against them for want of prosecution. Instead of responding to the motion in compliance with CPLR 3216 by showing a justifiable excuse for delay in prosecution and a meritorious claim, the petitioner, in the sixth year after his action had been commenced, cross-moved in February 1975 to serve an amended complaint against all the defendants in place of the claim that had been finally rejected by the Court of Appeals over one year before. This audaciously late maneuver was correctly denied by the Supreme Court, Queens County, at

Special Term Part I, in an opinion (9a) which granted the motions of Johnson & Higgins and Frank B. Hall to dismiss for want of prosecution and denied plaintiff's belated motion for leave to serve an amended complaint.

The decision at Special Term was affirmed by the Appellate Division of the Supreme Court, Queens County, on February 2, 1976 (51 AD 2nd 717) in an opinion which stated (7a):

> "Plaintiff did not show a justifiable excuse for the delay in prosecution and a good and meritorious cause of action, as required by CPLR 3216 (see *Brender* v. *Berman*, 37 A.D. 2d 835). Issue was joined in 1969; summary judgment was granted in favor of the defendant association and certain of the individual defendants in 1970 and 1971, respectively, and affirmed by this court in each instance (*Cataldo* v. *Buglass*, 36 A.D. 2d 720, mot. for lv. to app. den., 32 N.Y. 2d 518, *id.* 42 A.D. 2d 564, mot. for lv. to app. den., 33 N.Y. 2d 518). Plaintiff failed to resume prosecution and to file a note of issue within 45 days of service upon him of the separate demands therefor of the corporate defendants, made in 1974 and 1975. Rather, upon their motions to dismiss, plaintiff cross-moved to amend his complaint, alleging a new understanding of the parole evidence rule as set forth in a case decided in 1962. Such delay in seeking amendment precludes its being granted (see *DeFabio* v. *Nadler Rental Serv.*, 27 A.D. 2d 931)."

Leave to appeal or reargue was denied by the Appellate Division on March 4, 1976 (p. 11) and a motion for leave to appeal (as well as an appeal taken as of right) was dismissed by the Court of Appeals on May 4, 1976 for lack of appellate jurisdiction on the ground that "the order sought to be appealed from involves a question of discre-



tion of the type not reviewable by the Court of Appeals" *Cataldo* v. *Buglass, et al.*, 39 N.Y. 2d 807 (3a) and, a motion for reargument thereon was denied on September 21, 1976 (1a).

## Reasons for Denying the Writ

1. On November 14, 1973 the merits of the claims of the petitioner had been finally rejected, severed and dismissed at the conclusion of all appeals in the courts of the State of New York on the motions for summary judgment made by all of the respondents except Johnson & Higgins and Frank B. Hall and, thus, the petitioner's claims for relief were "in final judicial repose" on that date as against all but those two defendants." See *Slater* v. *American Min. Spirits Co., et al.*, 33 N.Y. 2d 443, 447 (1974). In addition, the petitioner concedes (page 21 of his petition) that he "cannot complain that the original complaint for reformation [and damages] was dismissed."

Yet, when two remaining defendants, Johnson & Higgins and Frank B. Hall moved one year later to dismiss the complaint as against them for want of prosecution after the petitioner had failed to serve a note of issue, pursuant to the statutory demand therefor, he made no attempt to justify his failure to prosecute and posed no federal ground whatever in opposition to the motion. Indeed, in an affidavit, requesting reargument in the Appellate Division, he acknowledged that CPLR 3216 (authorizing dismissal upon the failure of a plaintiff to serve and file a note of issue, in accordance with such demand) is not unconstitutional, citing *Cohn* v. *Borchard Affiliations*, 25 N.Y. 2d 237 (1969), holding CPLR 3216 to be constitutional.

Clearly, the dismissal for want of prosecution amounted to no more than the exercise of discretion by the courts of

the State of New York to dismiss for want of prosecution, well within the power of all courts, both state and federal, to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 630, 631 (1962).

Indeed, in the analogous context of delayed discovery in the federal courts, this court noted that courts are authorized and required to exercise their discretionary power to impose sanctions for undue delay "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, —— U.S. ——, 96 S.Ct. 2778 at 2781 (June 30th 1976).

2. The petitioner did not (and could not) claim any constitutional federal right to belatedly serve an amended version of his nonfederal claims as against all of the defendants by a motion made more than one year after their final disposition as against all but two of the defendants, a denial held, on appeal, to be well within the bounds of the state court's judicial discretion.

Contrary to the tenor of petitioner's argument, the amendment procedure of a state court is not subject to the directives of the Federal Rules of Civil Procedure, but even those rules would not require the grant of leave to a plaintiff in 1975 to serve an amended complaint as a matter of right five years after the commencement of an action and more than one year after the plaintiff's original claims had been finally rejected on appeal, for the purpose of asserting a new theory as against all the defendants, on the basis of an alleged prior misconception of the law and a purported different understanding of the law allegedly set forth in a case decided years before, in 1962. Cf. *Troxel*



*Manufacturing Co.* v. *Schwinn Bicycle Co.*, 489 F.2d 968 (6 Cir., 1973).

3. Curiously, the petitioner appears to urge that the state court unconstitutionally deprived him of a jury trial of his nonfederal claim, even though the question of a trial by jury was never raised in the state court, since there were no triable issues of fact presented on the finally decided summary judgment motions and no note of issue was ever filed demanding a jury trial as required by the New York law which provides that a jury may only be demanded when a note of issue for trial is served and filed (CPLR 4102).

In any event, "a trial by jury is not constitutionally required" in a state court civil action of petitioner's nonfederal claims. *Alexander et al.* v. *Virginia*, 413 U.S. 836 (1972). Manifestly, the Fourteenth Amendment does not guarantee any particular form or method of state procedure in a civil action. As stated in *Olesen* v. *Trust Company of Chicago*, 245 F.2d 522, 524 (7 Cir., 1957):

> "It is clear there is no federal question involved in the case at bar. The Seventh Amendment of the United States Constitution applies to trials in the United States Courts . . .
>
> A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. 'The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure.' Hardware Dealers' Mutual Fire Insurance Company of Wisconsin v. Glidden Co., 284 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214."

4. Apart from the absence of a federal question, the petition presents no question of importance that would

warrant the review by this court, of a discretionary determination by a state court of intermediate appellate jurisdiction of a type which even the highest court of that state declined to review, and which the state judicial system has assigned for determination by its trial and intermediate appellate courts. See 7 Weinstein-Korn-Miller ¶ 5501.22.

## CONCLUSION

**The petition for a writ of certiorari should be denied.**

Dated: January 17, 1977.

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